75-5960

Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1975

75-5960

ALBERT LEWIS CAREY, JR.,
Petitioner,

v.

STATE OF NORTH CAROLINA,
Respondent.

ON WRIT OF CERTIORARI
TO THE
SUPREME COURT OF NORTH CAROLINA

RESPONSE TO PETITION FOR WRIT CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

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CITATION TO OPINION BELOW

The opinion of the Supreme Court of North Carolina is reported at 288 N.C. 254, 218 S.E. 2d 387 (1975), and is appended to petitioner's petition as Appendix A.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

I. WHETHER THE IMPOSITION AND CARRYING OUT OF THE DEATH SENTENCE FOR THE CRIME OF MURDER UNDER THE LAW OF NORTH CAROLINA VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES?

II. WHETHER PETITIONER'S RIGHT TO CONFRONT THE WITNESS AGAINST HIM AND HIS RIGHT TO A FAIR TRIAL AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES WERE VIOLATED?

III. WHETHER PETITIONER'S ORAL STATEMENT TO A POLICE POLYGRAPH OPERATOR, MADE VOLUNTARILY DURING CUSTODIAL INTERRAGATION, SHOULD HAVE BEEN EXCLUDED?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

I. Petitioner's petition is apparently predicated on the fifth, sixth, eighth and fourteenth amendments to the Constitution of the United States.

II. Additionally, petitioner's petition also involves the following provisions of the General Statutes of North Carolina:

§14-17 (repl. vol. 1969):

> "Murder in the first and second degree defined; punishment. - A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or other felony, shall be deemed to be murder in the first degree and shall be punished with death: Provided, if at the time of rendering its verdict in open court, the jury shall so recommend the punishment shall be imprisonment for life in the State's prison, and the court shall so instruct the jury. All other kinds of murder shall be deemed murder in the second degree, and shall be punished with imprisonment of not less than two nor more than thirty years in the State's prison."

§14-87 (repl. vol. 1969):

> "Robbery with firearms or other dangerous weapons. - Any person or persons who, having in possession or with the use or threatened use of any firearms or other dangerous weapons, implement or means, whereby the life of a person is endangered or threatened, unlawfully takes or attempts to take personal property from another or from any place of business, residence or banking institution or any other place where there is a person or persons in attendance, at any time, either day or night, or who aids or abets any such person or persons in the commission of such crime, shall be guilty of a felony and upon conviction thereof shall be punished by imprisonment for not less than five nor more than thirty years."

§15-176.3 (repl. vol. 1975):

> "Informing and questioning potential jurors on consequences of guilty verdict. - When a jury is being selected for a case in which the defendant is indicted for a crime for which the penalty is a sentence of death, the court, the defense, or the State may inform any person called to serve as a potential juror that the death penalty will be imposed upon the return of a verdict of guilty of that crime and may inquire of any person called to serve as a potential juror whether that person understands the consequences of a verdict of guilty of that crime."

§15-176.4 (repl. vol. 1975):

> "Instruction to jury on consequences of guilty verdict. - When a defendant is indicted for a crime for which the penalty is a sentence of death, the court, upon request by either party, shall instruct the jury that the death penalty will be imposed upon the return of a verdict of guilty of that crime."

§15-176.5 (repl. vol. 1975):

> "Argument to jury on consequences of guilty verdict. - When a case will be submitted to a jury on a charge for which the penalty is a sentence of death, either party in its argument to the jury may indicate the consequences of a verdict of guilty of that charge."

§15-187 (repl. vol. 1975):

> "Death by administration of lethal gas. - Death by electrocution under sentence of law is hereby abolished and death by the administration of lethal gas substituted therefor."

§15-188 (repl. vol. 1975):

> "Manner and place of execution. - The mode of executing a death sentence must in every case be by causing the convict or felon to inhale lethal gas of sufficient quantity to cause death, and the administration of such lethal gas must be continued until such convict or felon is dead; and when any person, convict or felon shall be sentenced by any court of the State having competent jurisdiction to be so executed, such punishment shall only be inflicted within a permanent death chamber which the superintendent of the State penitentiary is hereby authorized and directed to provide within the walls of the North Carolina penitentiary at Raleigh, North Carolina. The superintendent of the State penitentiary shall also cause to be provided, in conformity with this article and approved by the Governor and Council of State, the necessary appliances for the infliction of the punishment of death in accordance with the requirements of this article."

STATEMENT OF CASE

The petitioner, Albert Lewis Carey, was indicted for murder, armed robbery and conspiracy to commit attempted armed robbery based on events occurring on 19 June 1973 in Charlotte, North Carolina. Petitioner was convicted and sentenced for murder in the first degree and conspiracy to commit armed robbery at the 26 November 1973 session of Mecklenbury County Superior Court. In an opinion filed on 1 July 1974

the Supreme Court of North Carolina ordered a new trial, 285 N.C. 497, 206 S.E. 2d 222 (1974).

Petitioner was tried again and on 19 December 1974 was convicted and sentenced to death for murder in the first degree and convicted and sentenced to ten years imprisonment for conspiracy to commit attempted armed robbery. These convictions and sentences were affirmed by the Supreme Court of North Carolina in an opinion filed on 7 October 1975, 288 N.C. 254, 218 S.E. 2d 387 (1975), and it is this decision which petitioner seeks to have reviewed.

STATEMENT OF FACTS

The State respondant adopts as its own, as if fully set out herein, the facts as found by the North Carolina Supreme Court, 288 N.C. 257-265, 218 S.E. 2d 389-394 (see Petitioner's Appendix A, 3A-8A).

ARGUMENT

I. THE QUESTION OF WHETHER THE IMPOSITION OF THE DEATH SENTENCE CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT IS INSUFFICIENT GROUNDS FOR THE COURT TO GRANT CERTIORARI.

There is no valid reason for this court to grant certiorari upon the question of whether the death sentence in this case violates the eighth or fourteenth amendments to the Constitution of the United States. Certiorari was granted by this court in the cases of Fowler v. North Carolina, 73-7031 (October Term, 1974) and Woodson & Waxton v. North Carolina, 75-5491 (term 75) to review this identical question. In Fowler extensive briefs were submitted and oral arguments were had before this court on 21 April 1975. In Woodson & Waxton briefs are forthcoming and argument is scheduled for March 30, 1976. Therefore, this particular question as raised by petitioner has been presented to the court, has been accepted for hearing by the court, some oral arguments before the court have already been made, and further arguments are to be made. Any decision in this case should be dependent upon the outcome of the Fowler and Woodson & Waxton cases, and the petition to grant certiorari should be denied.

II. THE COURT SHOULD NOT GRANT CERTIORARI SINCE PETITIONER'S RIGHT TO CONFRONT THE WITNESSES AGAINST HIM AND HIS RIGHT TO A FAIR TRIAL AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES WERE NOT VIOLATED BY THE CHOICE IMPOSED UPON HIM BY THE TRIAL COURT WITH REGARD TO THE WITNESS HOLMBERG.

Petitioner relies upon Chambers v. Mississippi, 410 U.S. 284 (1973) for the proposition that he was "thwarted in his attempt to present... [a] portion of his defense by the strict application of...[state] rules of evidence." However, petitioner arrives at this argument by unconvincing and illogical reasoning. It is noteworthy that in Chambers the trial court affirmatively limited the defendant's right to cross-examine by narrowly interprepeting the adverse witness rule. That case, along with the sundry others cited by petitioner, are easily distinguishable from the present case in that at no time did the trial court here limit the petitioner's right to cross-examine.

Petitioner's option was to open the door to a full exploration of what was said by Officer Holmberg, an option which could not reasonably be considered as constitutionally impermissible since, under State v. Foye, 254 N.C. 704, 120 S.E. 2d 169 (1961) and State v. Williams, 279 N.C. 515, 184 S.E. 2d 282 (1971), only the results of a polygraph test are inadmissible as evidence. As it was held in Foye and refined in Williams there is no prejudicial error committed where there is "no evidence, before the jury, as to the nature of the test, questions propounded, the answers given, or the result of the test." State v. Williams, 279 N.C. at 524, 184 S.E. 2d at 288.

As the North Carolina Supreme Court aptly observed in this case below, the jury in the present case " never heard any testimony as to the results of a polygraph test. In fact, defendant was not administered a complete polygraph examination and there were no results for the jurors to hear." State v. Carey, 288 N.C. at 267, 218 S.E. 2d at 395. Thus it would seem that petitioner was not barred in any way from a thorough cross-examination of Holmberg but was merely confronted with a tactical decision. Indeed, the trial court indicated that it did not care what petitioner asked Mr. Holmberg. (R p 55) The court went further to explain

that if petitioner did ask Holmberg to tell what he told petitioner the day before, then the court would let Holmberg tell everything that he said to him. The court indicated that to do otherwise would not be fair to the State. The petitioner made his choice and should therefore be left with it.

The State of North Carolina would thus urge this petition for writ of certiorari be denied because no unconstitutional limitation was in fact placed upon petitioner's right to cross-examine the witness Holmberg.

III. CERTORARI SHOULD BE DENIED BECAUSE PETITIONER'S ORAL STATEMENT TO THE POLICE POLYGRAPH OPERATOR WAS MADE VOLUNTARILY.

The present case stands in great contrast with the situation in Blackburn v. Alabama, 361 U.S. 199 (1960), a case relied upon by petitioner. In Blackburn, the defendant had been classified by a veteran's hospital as a 100% "incompetent", i.d. at 201, and the interrogation resulting in confession consumed eight or nine hours, i.d. at 204. To the same or greater extent each of petitioner's other citations to coerced confessions are distinguishable and further inappropriate since they were almost invariably pre-Miranda cases where often defendants were not advised of their constitutional rights.

State of North Carolina contends that the trial court's findings as to the voluntariness of petitioner's confession are compelling and well supported by the evidence obtained on voir dire. The trial court found and the voir dire evidence shows that the defendant was fully advised of his rights and had executed a written waiver of his right to remain silent and have an attorney present; that on the previous day the defendant had voluntarily agreed to take a polygraph test but that Officer Holmberg determined that because of the condition of the defendant an accurate test could not be given at that time; that the next day the defendant was brought to the polygraph room at which time he stated he had been advised of his rights but declined to sign a consent to take the polygraph test; and at that time defendant voluntarily and without questioning confessed to his part in the crime. (R pp 46-49) There is very little in the record to support an argument of coercion,

physical or mental, especially any such coercions sufficient to rise to that which was proscribed in Blackburn.

CONCLUSION

For the above reasons the State of North Carolina thus urges this Court to deny petitioner's petition for writ of certiorari.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has this day served a copy of the foregoing Response to Petition for Writ of Certiorari upon the person indicated below by depositing a copy of the same in the United States mail, postage prepaid, addressed to the following:

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